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7 MARRIOTT INTERNATIONAL, INC.
(Erroneously sued herein as Marriott of San
Francisco) and SAM SNOWDEN

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RICHARD E. WILMSHURST

Plaintiff,

V.

MARRIOTT OF SAN FRANCISCO, SAM
SNOWDEN, IGNATIUS CHINN,
WILLIAM LOCKYER, BLAKE
GRAHAM, LEE CAREAGA, JOHN
MARSH, and KISU YO AND DOES 1
through 100,

18 Defendants.

Case No. C-07-03790 WHA

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MARRIOTT INTERNATIONAL, INC.'S
AND SAM SNOWDEN'S MOTION TO
DISMISS PURSUANT TO FRCP 12(b)(5)
AND 12(b)(6)]**

Date: January 17, 2008
Time: 8:00 a.m.
Courtroom: 9
Judge: Hon. William H. Alsup

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1 **I. INTRODUCTION/ALLEGATIONS OF COMPLAINT**

2 This “civil rights” action has been brought by Richard E. Wilmshurst against several state
 3 law enforcement officers and officials as well as Marriott International, Inc (erroneously sued as
 4 Marriott of San Francisco) and Marriott employee Sam Snowden. Mr. Wilmshurst claims that
 5 while attending a Legal Community Against Violence dinner at the Marriott Hotel on June 29,
 6 2005, he was first detained by law enforcement officer Ignatius Chinn. [Complaint, 2:25-28, 3:4-
 7]. According to Mr. Wilmshurst, he was released and attended the dinner. After the dinner, Mr.
 8 Wilmshurst was returning to his hotel room and was allegedly “attacked” by Mr. Chinn, Blake
 9 Graham, Lee Careaga, John Marsh and Kisu Yo (all of whom are alleged to be employees of the
 10 State of California). [Complaint, 3:8-15]. The Complaint further states that “with Sam Snowden
 11 in attendance” the state employees knocked plaintiff to the ground, arrested him and eventually
 12 Mr. Wilmshurst was cited by Mr. Chinn for resisting arrest. [Complaint, 3:11-15].

13 Plaintiff claims that the foregoing events resulted in a deprivation of his 1st, 4th, 5th and
 14th amendments alleging a cause of action for a violation of Title 42 U.S.C. §1983 (1st Cause of
 15 Action). In addition, Mr. Wilmshurst claims that “employees of the San Francisco Marriott
 16 conspired with” the state parties to violate his civil rights in violation of §1983 (2nd Cause of
 17 Action). Finally, Plaintiff claims, in conclusory fashion, that Marriott “allowed Richard to be
 18 falsely arrested and participated in the arrest” (3rd Cause of Action).

19 The instant Complaint was filed on July 16, 2007. [See Complaint and Civil Docket for
 20 Case #3:07-cv-03790-WHA]. The 120 days to serve the Complaint on defendants expired on
 21 November 13, 2007. Summons was not issued until October 24, 2007. [See Civil Docket for
 22 Case #3:07-cv-03790-WHA]. Sam Snowden was not served until November 20, 2007 [See Court
 23 Docket and Conant Declaration] and Marriott International, Inc. has not been served with
 24 anything but Plaintiff’s Case Management Conference. [See Conant Declaration].

25 **II. SUMMARY OF ARGUMENTS**

26 For each of the foregoing reasons, Mr. Wilmshurst’s Complaint against Marriott and Mr.
 27 Snowden is subject to dismissal:

28 • The Complaint should be dismissed with prejudice pursuant to Federal Rule of Civil

1 Procedure 4(m) and 12(b)(5) as Plaintiff failed to timely serve Marriott and Mr. Snowden
 2 within 120 days of the filing of the Complaint;

- 3 • The 1st Cause of Action for violation of 42 U.S.C. §1983 is barred by the applicable two
 4 year statute of limitations;
- 5 • The 1st Cause of Action for violation of 42 U.S.C. §1983 is barred as Plaintiff has failed
 6 to state fact sufficient to constitute a cause of action against Marriott or Mr. Snowden;
- 7 • The 2nd Cause of Action for Conspiracy is barred by the applicable two year statute of
 8 limitations set forth in California Code of Civil Procedure §335.1;
- 9 • The 2nd Cause of Action for Conspiracy is barred as Plaintiff has failed to state fact
 10 sufficient to constitute a cause of action against Marriott or Mr. Snowden;
- 11 • The 3rd Cause of Action for “allowing Richard to be falsely arrested and participated in
 12 the arrest” is barred by the applicable two year statute of limitations set forth in §335.1;
- 13 • The 3rd Cause of Action for “allowing Richard to be falsely arrested and participated in
 14 the arrest” is barred as Plaintiff has failed to state fact sufficient to constitute a cause of
 15 action against Marriott or Mr. Snowden.

16 **III. AUTHORITY FOR MOTION**

17 F.R.C.P. 12(b)(6) provides that a defendant may make a motion to dismiss for “failure to
 18 state a claim upon which relief can be granted.” When ruling upon a motion to dismiss under
 19 FRCP 12(b)(6) the Court is only required to accept as true well-pleaded allegations. It is not
 20 required to accept conclusions of law. *Leeds v. Meltz*, 85 F.3d 51, 53 (2d Cir. 1993) [“While the
 21 pleading standard is a liberal one, bald assertions and conclusions of law will not suffice.”]. A
 22 dismissal of a claim pursuant to Rule 12(b)(6) is proper where there is an “absence of sufficient
 23 facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Department*, 901 F.2d
 24 696, 699 (9th Cir. 1990).

25 **A. THE COMPLAINT SHOULD BE DISMISSED PURSUANT TO FRCP 4(m)
 26 AND FRCP 12(b)(5) FOR PLAINTIFF’S FAILURE TO SERVE THE
 27 COMPLAINT WITHIN 120 DAYS OF FILING**

28 Despite being advised by the Court, in writing, that the matter would be subject to
 dismissal if the Complaint was not served by November 13, 2007 (See, Court Order Denying

1 Plaintiff's Second Motion Continuing Case Management Conference and Deadlines), Plaintiff
 2 failed to properly affect timely service on defendant Sam Snowden or defendant Marriott.¹ As
 3 over one hundred twenty days elapsed since the filing of the complaint on July 16, 2007, and no
 4 good cause can be shown for the delay, the Complaint should be dismissed pursuant to Federal
 5 Rule of Civil Procedure 4(m). Thus, Defendants Sam Snowden and Marriott International,
 6 Inc.(erroneously sued as Marriott of San Francisco) bring this Federal Rule of Civil Procedure
 7 12(b)(5) motion to dismiss the action.

8 Federal Rule of Civil Procedure 4(m) provides:

9 If service of the summons and complaint is not made upon a
 10 defendant within 120 days after the filing of the complaint, the
 11 court, upon motion or on its own initiative after notice to the
 12 plaintiff, shall dismiss the action without prejudice as to that
 13 defendant or direct that service be effected within a specified
 14 time; provided that if the plaintiff shows good cause for the
 15 failure, the court shall extend the time for service for an
 16 appropriate period. (emphasis added).

17 The "good cause" requirement applies to pro se plaintiffs as well as represented plaintiffs.
 18 Simply representing one's self and asserting "ignorance of the law" does not excuse the failure to
 19 timely serve summons and complaint. *Hammad v. Tate Access Floors, Inc.* (D MD 1999) 31
 20 F.Supp.2d 524, 528; *Echevarria v. Department of Correctional Services of New York City* (SD
 21 NY 1999) 36 F.Supp.2d 106, 1073. As the U.S. Supreme Court has stated, "We have never
 22 suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse
 23 mistakes by those who proceed without counsel" *McNeil v. United States*, 508 U.S. 106, 113, 113
 24 S.Ct. 1980 (1993); See also *DiCesare v. Stuart*, 12 F.3d 973, 980 (10th Cir. 1993) ("A pro se
 25 litigant is still obligated to follow the requirements of FED.R.CIV.P. 4") (emphasis in original).
 26 While the Court may take Mr. Wilmhurst's pro se status into account in exercising its discretion
 27 in determining whether good cause has been established, the Court should not find that the
 28 plaintiff's pro se status automatically entitles him to a finding of good cause. *Veal v. United*

27 ¹ Mr. Snowden was personally served with Summons and Complaint on November 20, 2007 (See
 28 docket entry dated November 20, 2007); Marriott has not been properly served with Summons
 and Complaint.

1 *States*, 2002 U.S. Dist. LEXIS 16040 (3d Cir. Del., 2002). Likewise, failure to read the rules
 2 governing service of process has been found to be the "antithesis of good cause" for a failure to
 3 serve a defendant. *Tuke v. United States*, 76 F.3d 155, 156 (7th Cir. 1996) .

4 Plaintiff has been a pro per litigant in several federal lawsuits according to a review of the
 5 PACER index. There can be no justification for his failure to comply with the Federal rules of
 6 Civil Procedure. Consequently, Defendants Snowden and Marriott move that they be dismissed
 7 from the suit forthwith pursuant to FRCP 4(m) and FRCP 12(b)(5).

8 **B. THE COMPLAINT IS BARRED BY THE APPLICABLE STATUTE OF
 9 LIMITATIONS**

10 In the alternative, Defendants also move, pursuant to FRCP 12(b)(6), to dismiss the
 11 Complaint as the entire action is barred by the applicable two year statute of limitations. The
 12 Complaint alleges the "false arrest" occurred on June, 29, 2005. The instant Complaint was filed
 13 on July 16, 2007, over two years after the facts giving rise to the conspiracy, false arrest and
 14 related "civil rights" claims alleged in the Complaint. The statute of limitations on a §1983 claim
 15 seeking damages for a false arrest is a accrues when the claimant becomes detained. *Wallace v.
 16 Kato*, 127 S.Ct. 1091, 1100 (2007). Where the complaint shows a statute of limitations defense is
 17 available, a motion to dismiss pursuant to FRCP 12(b)(6) is appropriate. *Jablon v. Dean Witter &
 18 Co.*, 614 F.2d 677, 682 (9th Cir. 1980).

19 The two year statute of limitations set forth in California Code of Civil Procedure §335.1
 20 governs the various causes of action pled in the operative Complaint. See, *Thompson v. City of
 21 Shasta Lake*, 314 F.Supp.2d 1017, 1023 (E.D. Cal. 2004); *Washington v. Cambra* WL 22697273
 22 (N.D. Cal. 2003) [Section 1983 civil rights action]; *Rita M. v. Roman Catholic Archbishop* (1986)
 23 187 Cal.App.3d 1453, 1460 [civil conspiracy governed by California's personal injury statute of
 24 limitations]. As the face of the Complaint shows that the facts giving rise to the lawsuit occurred
 25 over two years before the Complaint was filed, the claims are time-barred and subject to
 26 dismissal. As no amendment can be made to cure this procedural defect, leave to amend should
 27 be denied. *Jablon v. Dean Witter & Co.*, *supra*, 614 F.2d at 682.

1 **C. ALTERNATIVELY, THE COMPLAINT SHOULD BE DISMISSED FOR**
 2 **PLAINTIFF'S FAILURE TO ALLEGGE SUFFICIENT FACTS TO STATE A**
 3 **VIABLE CLAIM AGAINST DEFENDANTS MARRIOTT AND SNOW**

4 **1. §1983 Claim**

5 Plaintiff's Complaint also fails, on its face, to state facts to allege any conceivable civil
 6 rights violation claim against Mr. Snowden or Marriott—private persons.²

7 42 U.S.C. § 1983 creates no substantive rights; it provides a right of action for
 8 constitutional violations and violations of federal laws which themselves have no remedy.
 9 *Chapman v. Houston Welfare Rights Org.*, 441 US 600, 617-618; 99 S.Ct. 1905 (1979);
 10 *Pennhurst State School and Hospital v. Halderman*, 451 US 1; 101 S.Ct. 1531 (1981).

11 Here, Mr. Wilmhurst claims deprivation of due process protected by the First, Fourth,
 12 Fifth and Fourteenth Amendments. The Fourteenth Amendment (section 1) provides that no state
 13 shall “deprive any person of life, liberty, or property, without due process or law...” and imposes
 14 civil liability on an individual who “under color [of state law] ... subjects, or causes to be
 15 subjected, any citizen of the United States ... to the deprivation of any rights, privileges or
 16 immunities secured by the Constitution and laws.” 42 U.S.C. § 1983.

17 A civil rights plaintiff suing a private individual under § 1983 must demonstrate that the
 18 private individual acted under color of state law since plaintiffs do not enjoy Fourteenth
 19 Amendment protections against “private conduct abridging individual rights.” *Burton v.*
 20 *Wilmington Parking Auth.*, 365 U.S. 715, 722, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). Thus, Section
 21 1983 liability only applies to individuals who carry a badge of authority of a State and
 22 represented it in some capacity. As private persons, neither Marriott nor Mr. Snowden are
 23 capable of state action necessary to for a violation of civil rights claim unless Plaintiff alleged
 24 facts showing that the defendants were clothed with the authority of the state and were purporting

27

 28 ² It is unclear whether Mr. Wilmhurst intended to assert the First Cause of Action against
 Marriott and Mr. Snowden, but for the sake of completeness, the claim is addressed herein.

1 to act under that authority. *Sykes v. State of California*, 497 F.2d 197, 200 (9th Cir. 1974). No
 2 such facts are stated in the instant complaint. Marriott nor Mr. Snowden did not initiate, request
 3 or affect an arrest of Mr. Wilmhurst.

4 The cases require a substantial degree of cooperation before imposing civil liability for
 5 actions by private individuals that impinge on civil rights. *Howerton v. Gabica*, 708 F.2d 380,
 6 384k-85 (9th Cir.1983) [landlord had engaged in joint action with police officers in the course of
 7 the landlord's sustained efforts to evict a tenant. Landlord "repeatedly requested aid by the police
 8 to effect the eviction, and the police intervened at every step."].

9
 10 Here, there is no allegation of any conspiracy or joint action between Mr. Snowden and
 11 the law enforcement officers.

12 Furthermore, in order for a private individual to be liable for a § 1983 violation when a
 13 state actor commits the challenged conduct, the plaintiff must establish that the private individual
 14 was the proximate cause of the violations. *King v. Massarweh*, 782 F.2d 825, 829 (9th Cir.1986).
 15 [A]bsent some showing that a private party had some control over state officials' decision [to
 16 commit the challenged act], the private party did not proximately cause the injuries stemming
 17 from [the act]; *Pomerantz v. County of Los Angeles*, 674 F.2d 1288, 1291 (9th Cir. 1982).

18
 19 *Arnold v. IBM Corp.*, 637 F.2d 1350 (9th Cir.1981), is instructive. There, a task force
 20 including law enforcement officials, the district attorney, and an IBM security manager
 21 investigated trade secret leaks from within IBM. After his arrest and indictment and the search of
 22 his home, the plaintiff sued IBM under § 1983 based on its involvement with the investigation.
 23 The 9th Circuit Court of Appeal held that, although IBM provided the task force with its security
 24 manager, information, funding, and grand jury witnesses, the company was not the proximate
 25 cause of the plaintiff's alleged injuries because it did not direct the task force to take action
 26 against him. *Id.* at 1356-58.

1 A complaint which presents only generalized and vague allegations that private citizens
 2 participated in “civil rights violations” such as the allegations in the instant Complaint are
 3 insufficient to withstand a motion to dismiss. *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992)
 4

5 In addition, to the extent the Complaint seeks to hold Marriott responsible under a
 6 *respondeat superior* or “supervisory liability” theory by virtue of Mr. Snowden’s employment
 7 with Marriott, the claim is likewise barred. Liability under 42 U.S.C. §1983 is imposed for
 8 depriving the Plaintiff of rights secured by the Constitution or other federal laws, not for
 9 negligent breach of a duty of care arising from tort law. *Daniels v. Williams*, 474 U.S. 327, 329
 10 (1986).

11 **2. *Conspiracy and “Failure to protect from false arrest claim”***

12 As discussed above, the Complaint is devoid of any allegation that any act or omission by
 13 Mr. Snowden or Marriott were “actions under color of state law.” In order to be liable under
 14 §1983 as a co-conspirator, a private defendant must share with the public entity the goal of
 15 violating a plaintiff’s constitutional rights. *Gallagher v. Neil Young Freedom Concert*, 49 F.3d
 16 1442, 1453 (10th Cir.1995) (holding that public university’s acquiescence in private security
 17 team’s pat-down searches of concert-goers did not establish state action under joint action test,
 18 despite shared goal of producing a profitable event). No such facts are pleaded in the instant case.

19 Thus, the Complaint fails to set forth, with specificity, what actions by Mr. Snowden or
 20 Marriott violated Plaintiff’s constitutional rights or how they “conspired” with law enforcement.
 21 Further, Plaintiff has failed to plead facts to support the conclusory allegation that Mr. Snowden
 22 (and/or the Marriott) conspired with law enforcement or that anyone affiliated with Marriott
 23 touched or otherwise actively participated in the arrest (for example there is no allegation that
 24 anyone affiliated with the Marriott requested the arrest or otherwise acted in concert with law
 25 enforcement).

26 Any conceivable amendment would be insufficient to state a claim. A private person who
 27 makes representations or reports to a state official is not acting “under color of law” within the
 28 meaning of the Civil Rights Statutes. *Id.* Thus, any conceivable involvement of the private

1 defendants in “instigating” Mr. Wilmhurst’s arrest would be insufficient to state a claim unless
 2 there were facts pleaded that the arresting officers did not exercise their own independent
 3 judgment when they made the arrest and otherwise allegedly violated Mr. Wilmhurst’s
 4 constitutional rights. See, *Franklin v. Fox*, 312 F.3d 423, 446.

5 Finally, Plaintiff cannot cure the defect by alleging that Mr. Snowden and Marriott
 6 conspired with the other state defendants who were acting under color of state law since the state
 7 officials are immune from liability under the facts alleged. *Sykes v. State of California*, 497 F.2d
 8 197, 201 (9th Cir. 1974). [See Motion to Dismiss filed on behalf of former Attorney General
 9 Lockyer for applicable immunity authorities].

10 As for the vague, third cause of action, it appears that claim sounds in negligence
 11 (Marriott had a duty to protect Plaintiff from arrest). The Complaint is devoid of any facts giving
 12 rise to a duty on the part of Marriott to protect a guest from arrest by state law enforcement
 13 officials. As the essential elements of a separate tort claim have not been pled, the third cause of
 14 action is also subject to dismissal pursuant to FRCP 12(b)(6).

15 For all of the foregoing reasons, each of Plaintiff’s “violation of civil rights” claims are
 16 subject to dismissal as to Defendant Snowden and Defendant Marriott International, Inc. and
 17 since the pleading deficiencies cannot be cured by good faith amendment based upon the pleading
 18 admissions in the operative complaint, leave to amend should be denied.

19 **IV. CONCLUSION**

20 Based upon the foregoing, Defendants Marriott International, Inc. and Sam Snowden
 21 respectfully request that the Court grant the instant motions to dismiss, in their entirety, without
 22 leave to amend as Plaintiff Richard E. Wilmhurst failed to comply with FRCP 4 and on the
 23 further grounds that the claims asserted are barred by the applicable statute of limitations and fail
 24 to state facts sufficient to constitute a viable cause of action in any event.

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1 Dated: December 4, 2007

LOMBARDI, LOPER & CONANT, LLP

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By: /s/ GayLynn Kirn Conant

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GAYLYNN KIRN CONANT

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Attorneys for Defendants

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MARRIOTT INTERNATIONAL, INC.

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(Erroneously sued herein as Marriott of
San Francisco) and SAM SNOWDEN

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